

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-2125

VOLUME II

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

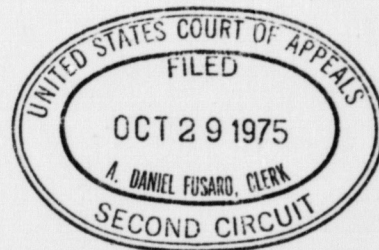
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UNITED STATES OF AMERICA, ex rel :
THOMAS F. BYRNES :
Petitioner-Appellant :
-against- :
HAROLD J. SMITH, Superintendent :
Attica Correctional Facility :
Respondent-Appellee :
----- -x

DOCKET NO. T-4950

On Appeal from the United States District
Court for the Eastern District of New York

APPENDIX FOR PETITIONER-APPELLANT

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P/S

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COUNTY COURT : NASSAU COUNTY
PART VI

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THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

Ind. #31912

THOMAS FRANCIS BYRNES, :

Defendant. :

----- x

Mineola, New York
November 29, 1971

Before :

HON. FRANK X. ALTIMARI, County Court Judge,
and a Jury.

Appearances :

(As heretofore mentioned.)

MINUTES OF TRIAL BY JURY

chambers, I will do so. If you care to have any conditions placed upon it, such as you would like to be present or--

MR. DULBERG: No, your Honor, I wouldn't ask that.

THE COURT: Or if you want to call the Reporter there, I will set up any safeguard that you, in your wisdom, would require. I can understand your position here. But we will take a fifteen minute recess, gentlemen. Please don't go away so that when I come back I won't have to go looking for you.

MR. DULBERG: Your Honor, would you like the additional psychological report?

THE COURT: Yes, anything and everything you have that would help me make a judgment.

All right.

(Recess.)

(After Recess.)

(In Chambers. Present: Assistant District Attorney Bekoff, Mr. Van Norman and Mr. Dulberg.)

(Defendant not present.)

THE COURT: All right. Now, I believe you should chat with her before she comes into chambers, Mr. Dulberg. I honestly don't know what to ask her. It's going to be a dialogue to help me in a judgment as to whether or not if and when she did testify, whether or not it would be such a--I know it is going to be a traumatic experience, there is no question about that--the question is would it be of such a severity that I in good conscience, can't permit it. That's all. I would ask you not to anticipate my questions when you chat with her. I think what you ought to tell her is to be absolutely frank and honest with the Judge and that he is trying to do the right thing.

MR. DULBERG: I just want her to have confidence in the Court. That's all.

THE COURT: I think that's the only way to handle it. But you certainly can use Mr. Orenstein's room.

MR. DULBERG: Thank you, your Honor. She will be brought in there first.

THE COURT: That's right.

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(Pause during proceedings.)

THE COURT: All right.

(Witness, Tamara Byrnes, present.)

THE COURT: You must be nervous, sweetheart?

WITNESS TAMARA BYRNES: (No response.)

THE COURT: You are a bit nervous. Tell me, what's your name?

WITNESS TAMARA BYRNES: Tammy.

THE COURT: I am Judge Altimari. I don't have my robes on. I have my sleeves rolled up. I am no different than any other man. You see that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Tammy, it may be necessary to ask you to take the witness stand. Do you understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You do? All right. Would you know what I mean when I say to you that someone would be asking you to take an oath?

WITNESS TAMARA BYRNES: Yes.

THE COURT: What would that mean, Tammy?

WITNESS TAMARA BYRNES: To tell the truth.

THE COURT: And you know the difference between the truth and something that is not the truth?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You see, actually when you ask somebody--you seem intrigued by this gentleman, (pointing to Reporter.)? He is very, very good. It is a shorthand machine. Some girls take shorthand with pencil and well, he is doing it with a machine. You see that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: So that everything I say and you say is being taken down. Just so there is no mistake. That's all. You understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Do you understand, dear, that when we take an oath we call upon God to witness the truth of what we say?

WITNESS TAMARA BYRNES: Yes.

THE COURT: We ask him to be a witness. Do you understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: To what we say. Now, I know that this must be a terrible experience for you. You see, it is impossible to even think in terms of what happened here without getting upset. You understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: And it is no shame to be upset. You know that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: It is normal, isn't it, and natural?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You know, there is an awful lot said, sweetheart, about a witness for or against somebody. You have heard that, haven't you?

WITNESS TAMARA BYRNES: (Shakes head no.)

THE COURT: A witness testifies for somebody or against somebody, you understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You see, I think, sweetheart, you never testify for or against somebody, you testify to the truth. You understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You see, what you say is either the truth or not. Now, what happens as a result of the testimony really is none of your concern. You understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: When you offer testimony you offer it for the truth of it, you see, you understand that, dear?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Sweetheart, do you think if I ask you to testify and if I do, you know, I will clear out the Courtroom, you know that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: So it will just be yourself, it will be me, it will be your dad's lawyer, and it will be your daddy, and I am sure this young lady here, Miss Barbara Hahn, who sits next to you, and do you think you are big enough to handle it?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You are indicating yes by shaking your head up and down?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Say yes, sweetheart.

WITNESS TAMARA BYRNES: Yes.

THE COURT: Whatever the answer may be. Or no. Do you think you can handle it?

WITNESS TAMARA BYRNES: Yes.

THE COURT: The last thing I want to do, sweetheart, is to hurt you and I won't let anybody hurt you, you can be assured of that. Nobody is going to get near you, because you have lawyers and you have the Judge here and especially me, I won't let anybody say or do anything that would hurt you. My question is this, sweetheart:

I am sure you want to forget this as soon as you can, is that true?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You think if you testify to the truth that after it is all over you will just try to blot it out of your mind, just forget about it?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Or whatever the psychiatrist or doctor said you should do, whether he said, to, you know, think about it, explain it away or understand

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it or to forget about it, whatever they said to do, do you think you can follow their advice?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Do you think you are up to testifying?

WITNESS TAMARA BYRNES: Yes.

THE COURT: Sweetheart, is there anything you want to tell me?

WITNESS TAMARA BYRNES: Like what?

THE COURT: Anything at all. Just relax now. We have time. There is no rush. And I really won't make up my mind, honey, until tomorrow morning. You will give me that time to think it over?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: All right. Is there anything you want to say to me at all, sweetheart?

WITNESS TAMARA BYRNES: (Shakes head no.) No.

THE COURT: You think you will be able to answer the questions?

WITNESS TAMARA BYRNES: Yes.

THE COURT: If you have the answers. Now, if you don't have the answers, you can't answer it.

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Is that right?

WITNESS TAMARA BYRNES: Yes.

THE COURT: But if you have the answer to the question, you think you will be able to answer it?

WITNESS TAMARA BYRNES: Yes.

THE COURT: You think you will be able to handle it? By that I mean, when it is all over?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: When was the last time you saw Daddy?

WITNESS TAMARA BYRNES: I don't recall.

THE COURT: Weeks ago, months ago, do you know when?

WITNESS TAMARA BYRNES: Months.

THE COURT: Do you think if you see him in the Courtroom, tomorrow, say, if it happens, that it will upset you to such an extent that you won't remember or do you think you can handle it?

WITNESS TAMARA BYRNES: I think I could handle it.

THE COURT: All right, Sweetheart. Is there anything at all now you want to tell me?

WITNESS TAMARA BYRNES: (Nods head no.)

THE COURT: All right. Sweetheart, maybe I will see you tomorrow morning. Tell you what--you see that's what happens to me too when I get nervous, my hands get cold and a little clammy. I don't know whether or not you will be called tomorrow. You tell me you can handle it. And let me think about it. Would you have a good night's sleep tonight?

WITNESS TAMARA BYRNES: (Nods head yes.)

MISS HAHN: Tell him about school.

THE COURT: What about school?

MISS HAHN: She was kind of hoping she would miss a day of school.

THE COURT: Well, you come in tomorrow morning with this pretty girl and I will tell you what I decided one way or another. All right?

WITNESS TAMARA BYRNES: All right.

THE COURT: All right. You have a good night's sleep and a good night. And don't forget now, whenever you get into difficulty, if you take the stand, you just turn to me, you understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: All right. Good-bye, sweetheart.

WITNESS TAMARA BYRNES: Good-bye.

(Tamara Byrnes leaves the Courtroom.)

THE COURT: All right. Gentlemen, I haven't made up my mind, but that's a sound young little girl there.

MR. VAN NORMAN: I wouldn't want to be in your shoes, your Honor. I have read that ^{and} I interpreted it entirely different than you.

THE COURT: Well, I might say this, that the affidavit which indicates in response to questions, quote, "if a fairy godmother could change her into anyone else in the world besides herself, whom would she choose to be?" And her response is: "doctor or nurse." That seems to be responsive to me. Then she is asked whether or not she would rather be a boy or girl and she said she would rather be a girl. That makes sense to me. Then she is asked what she would do if she were superman and she said, she replied that she would catch all of the people who steal. That seems to be responsive for an eleven year old girl.

MR. DULBERG: Your Honor, I believe that--

THE COURT: Don't interrupt please. Then she is asked what would she do if she were a giant and she said she didn't know. She said she would like to be a housewife. And then she said in response to a question if there was such a thing as reincarnation, what would she choose to return as and she indicated a horse. It would appear to me that the questions themselves call for answers which have been given. Especially in view of the fact it is an eleven year old girl. Then she has three wishes, one that her father be out of jail, two, to have a lot of money, and three, to have a big farm. I would dare say that anybody who is a father in this room and I am sure there are fathers in this room would indicate that their eleven year olds would respond in like manner. I am aware that the physician here states, "However, I reiterate that I feel strongly that she should not be permitted to testify further as it would cause irreparable psychic trauma." And this is Doctor Blackwell, whom I know rather well. At least he testified before me

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on other occasions.

MR. VAN NORMAN: For me to advance an argument, I don't think it is proper, your Honor, I think we should have Doctor Blackwell and the other psychiatrists here first thing in the morning and let them talk to you. The limited amount that I know of this area, it is not the experience that she has gone through, that's nothing really, they can correct that, it is the experience of walking into that Courtroom and taking the stand which will put her off the deep end and they will never be able to bring her back. That's as I know the picture of other cases that we were involved in. That's the problem. Not here. Not what she did with her father, assuming that she did it with her father. That's not. They can correct that. It is walking into that Courtroom and taking that stand and actually in Open Court stating it. And once that is done, she's like gone for the rest of the time. And I think that is what they will tell you.

MR. BEKOFF: Would you like to hear anything from me, your Honor?

THE COURT: You have something else to say?

MR. BEKOFF: Yes, one I know that the doctors, Dr. Blackwell and another fellow saw her a total of twice. The first was back at the end of March or the beginning of May. The second was last Friday when the uncle and the mother called and asked if they would see the girl. They only saw her twice and each visit was less than a half hour. I heard the question and answer related to me by Mr. Amato and Mrs. Byrnes. They were there during the questioning and I feel you ought to ask those people, your Honor, if you are to look into it, what the questioning was. They led me to believe that the psychiatrist said to the little girl before asking any questions, "You know, your daddy is in jail and if you go into Court and say something you are going to hurt him and do you want to see your daddy go to jail for a lot of years", and she didn't say anything.

Now, if you do that, and ask her do you want to testify and she paused for approximately five minutes and then she said no. Under those circumstances

your Honor, I submit anyone would say no.

THE COURT: Well, I think the answer to it rests, as counsel for the defendant has indicated, that we call Dr. Blackwell.

MR. DULBERG: May I just respond to what was said, your Honor?

THE COURT: Well, I think, gentlemen, I am going to make a judgment on what I have just observed with regard to this child and what I observe and hear after having heard Dr. Blackwell. Now, certainly after that has been concluded, if you wish to address yourselves as to the responses and anything else, I'd be happy to hear it. But I don't want to hear it now, gentlemen. And I don't mean to cut you short. I mean to say to you that I will hear intelligent argument only after the doctor testifies and not until then.

MR. DULBERG: Your Honor, would you like the Queens Society for the Prevention of Cruelty to Children, their social worker was also a physician and has been seeing the child twice a month?

THE COURT: Can you have everybody here

tomorrow morning at nine o'clock?

MR. DULBERG: I don't know if I can, but I will try.

THE COURT: Well, I can tell you now, I have seen enough in my opinion to make a judgment by chatting with this young lady. Now, if you wish to offer a physician or anything else tomorrow morning, do so. Nine o'clock.

MR. VAN NORMAN: We have been going at 9:30, your Honor. Are you changing it now to nine o'clock?

THE COURT: Only because I assume there is going to be testimony, and I am going to allow some cross examination of the physician, and the hearing itself may take an hour or more. Then it is the matter of my making a judgment. I have asked this jury to come in 10:30. I am sure if we start by eleven or 11:15, that will be fine. But the sooner the better. I am not going to say if you are not here at nine o'clock, that's the end of it. If you are not here at nine o'clock and you are here at 9:15, fine, we will do it at 9:15, but I am trying to aim for nine o'clock.

MR. VAN NORMAN: Well, I think the quicker

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he gets doing his particular job, the better qualified he will be at nine o'clock.

THE COURT: All right. I know Dr. Blackwell. He has testified for three and maybe four defendants in my Courtroom. He is a delightful chap. And a very accomodating sort of a man. And if you convey the thought to him that I would like him here as early as possible, he will try to make it. Tell him it is of extreme importance.

MR. DULBERG: He understands that.

THE COURT: If he wants to talk to me, I would be happy to talk to him at any time. All right?

MR. DULBERG: Yes, your Honor.

THE COURT: Let me give you--Mike, give him your telephone number.

MR. ORENSTEIN: Yes, your Honor.

THE COURT: If the doctor wants to call, tell him to get in touch with Mr. Orenstein.

MR. BEKOFF: Judge, can I prepare myself with witnesses too? Is this going to be an adversary hearing?

THE COURT: What witnesses would you bring in?

MR. BEKOFF: Certainly the Patrolman whom you just saw in here, I will bring her in.

THE COURT: I will listen to anything that would help me make a judgment. I don't think we should go out and make a trial out of it. I will listen to reason. I will listen to argument. I will listen to an offer of proof so long as it helps me make a judgment.

MR. BEKOFF: Fair enough, your Honor.

THE COURT: I don't think we can make a full blown trial out of this thing. You see, paramount, and the basis for my judgment is going to be my personal impression of this young lady. I hate to put it on that basis. But the judgment is mine. I don't mind telling you I don't like it. I don't like making that kind of a judgment. But most significant will be her appearance, demeanor and testimony or at least conversation a moment ago and that of the attending physician. Other than that we are talking in terms of a layman's attitude or an impression which I am not going to be too impressed by. All right?

I can tell you now it is going to be based upon what she just said plus what the good doctor has to offer tomorrow.

Gentlemen? You have your work cut out for you.

MR. DULBERG: I don't lose either way.

THE COURT: It was never meant to be easy.

MR. DULBERG: Well, this was a particularly troublesome situation.

THE COURT: All right.

Gentlemen, good evening. And many thanks for your cooperation.

(Whereupon, the above trial was adjourned.)

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COUNTY COURT : NASSAU COUNTY
PART VI

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THE PEOPLE OF THE STATE OF NEW YORK :

-against-

: Ind. #31912

THOMAS FRANCIS BYRNES,

:
Defendant. :

----- x
Mineola, New York
November 30, 1971

B e f o o r e :

HON. FRANK X. ALTIARI, County Court Judge,
and a Jury.

A p p e a r a n c e s :

(As heretofore mentioned.)

SAMUEL DULBERG, ESQ., Queens County Legal Aid Society.

MINUTES OF TRIAL BY JURY

(Jury not present.)

THE CLERK: People versus Thomas Francis Byrnes.

Trial continued.

THE COURT: Counsel, do you wish to be heard?

MR. VAN NORMAN: We have an application at this time, your Honor. Due to the information that you gave me this morning and my slight conversation with Mr. Byrnes, I would like to request of this Court that the defendant be examined pursuant to 658 of the Criminal Code again. I can't make head nor tail of the conversation that I am having with him. He is lucid to a certain extent but completely incoherent as to what he is telling me. He has a rather large laceration on the left side of his head, your Honor, which he indicates to me that he doesn't know how he got it but he hit himself against something. He also indicated he has taken more than ninety grams of various barbiturates that were given to him over a period of time and he has saved. So I don't think he is in a position today to continue the trial. And I would request an adjournment until such time as a thorough physical and mental examination

can be had of the defendant.

THE DEFENDANT: Your Honor, may I say something?

THE COURT: Yes.

THE DEFENDANT: It is not ninety grams, Jim. You know, I took twelve thousand grams. Now, by me

sitting here it is not going to do anything unless Jimmy, you know, wants me out of here. I tried to

commit suicide. Just so my kid won't come up to the stand and go through this ordeal. That's all.

I just want her left alone. You know, like if I could see her I think she would be all right. I

saw something in the report as to how she is acting. But, you know, like I don't care what you want, your

Honor, just don't put her up on the stand. I will plead guilty no matter what you want. Just leave

her alone. Leave all my family alone. I will plead guilty to it.

MR. VAN NORMAN: I respectfully request the examination be held, your Honor. I can't continue

at this particular stage without prejudicing both the defendant and--

THE COURT: Well, I think his statement to me

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was rather responsive. It was a statement made by a father who is concerned about his family. I think it is a decent remark, counsel. I don't think it is an inappropriate remark. I think it shows some sense of dignity. I don't think it is indicative of a man who doesn't know where he is. He knows exactly where he is by his very remarks. He knows he is in a Courtroom. He knows what he is charged with. He understands the nature of these charges. Implicit with everything he said. This man is competent to stand trial.

Now, he may be upset this morning. Now, an application for adjournment certainly might be in order at this stage. But certainly I find no basis to order another examination.

MR. VAN NORMAN: Well, your Honor, if we accept the statements made by the defendant thus far, he has taken certain narcotics, your Honor. And therefore, he is not in a position to be capable, at this particular time, to continue the trial. And I am asking for a one day adjournment until such time as this can be worn off or whenever a medical

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authority can say is necessary for these drugs to wear off and precaution be given to the jailers that nothing be given to him in order to avoid such an occurrence happening in the future.

THE COURT: This kind of an application makes sense to me. And I have no objection to this kind of an application. I have the report from the physician before me. He was discharged from the emergency room; "fit for confinement" conclusory remark. They take the position that his pupils are equal and reactive to light. I am going to mark this as a Court Exhibit so that it will be clear to whoever else wishes to pass upon it. But it is clear to me that--would you take that water away from him please.

THE SHERIFF: Yes, your Honor.

THE COURT: All right. It is clear to me he is upset. I think it is a perfectly normal reaction to what is going on here. I really don't think that you need all day. I think that just by my observation of him, sooner or later we are going to have to reach the stage of this trial where we will progress. He knows that you are representing

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him well. He knows where he is. Does the District Attorney wish to be heard?

MR. BEKOFF: No, your Honor. In this matter we feel we would rather leave it to the discretion of the Court.

THE COURT: Well, do you think he can remain in this Courtroom for so long as we at least make a judgment with regard to the testimony of Tamara Byrnes?

MR. VAN NORMAN: Your Honor, I have no reason to believe, unless your Honor can tell me to the contrary, that he has to be present during that hearing.

THE COURT: Well, I agree with you. But I am just wondering whether or not you wish to exercise the privilege of having a defendant present throughout all stages of these proceedings?

MR. VAN NORMAN: The problem in that is that I can't thoroughly discuss it with him and to get an intelligent answer out of him as to what he would like to do concerning that particular proceeding. And that's why I am asking for an adjournment until such

time as either the drug wears off or there is a further determination as to his condition.

THE COURT: The gentleman in the rear of the Courtroom from the Legal Aid Society, come forward please.

(Mr. Dulberg steps forward.)

THE COURT: Are you ready to proceed on the hearing?

MR. DULBERG: Yes, your Honor. I would have hoped that this situation and Mr. Byrnes' position could have been resolved before the Court would have to make a decision. That's what we would have hoped for. We would have liked to hold the hearing in abeyance pending Mr. Byrnes' determination as to what he wishes to do at this point; because I just heard him expressing a point of view now that makes us feel optimistic that perhaps your Honor wouldn't have to reach a determination as to whether or not Tammy would have to testify.

THE COURT: No, I believe that that determination should be made.

MR. DULBERG: Well, then we are ready.

THE COURT: Counsel, do you wish to have your client present at this hearing?

MR. VAN NORMAN: Your Honor, I would like to have him present. I don't know whether there is a need to have him present and I can't discuss that with him right now intelligently because I am not getting responsive answers.

THE COURT: He was rather responsive a moment ago. He indicated the concern and decency of every father that ever walked the face of this earth.

MR. VAN NORMAN: Your Honor, I indicated to you inside that at one moment he is lucid and the next moment he is completely incoherent. Now, for your Honor he happened to be lucid. I am not asking for something that is unreasonable, your Honor. I have never delayed this trial in any way. In fact, I was anxious to get the trial going.

THE COURT: I appreciate that. We do have a jury impaneled though.

MR. VAN NORMAN: I don't think the jury is going to in any way be prejudiced if we don't start this morning and we start this afternoon, your Honor.

THE COURT: Well, is it your request for an adjournment until two o'clock?

MR. VAN NORMAN: I think at least at two o'clock we will know whether or not he has adjusted properly to it, your Honor. I don't think that's unreasonable.

THE COURT: Fine. What would be the nature of your offer?

MR. DULBERG: The offer will come from Doctor Lanig.

THE COURT: Is he present?

MR. DULBERG: Yes, your Honor. He is the social worker from the Queens Society for the Prevention of Cruelty to Children. He is a medical doctor who studied psychiatry; and I believe he will testify to the fact that he has seen Tammy.

THE COURT: It is an offer of a psychiatric nature?

MR. DULBERG: In social work nature.

THE COURT: Fine.

Gentlemen, the trial of this matter is recessed until two o'clock, with direction to the gentlemen

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from the Sheriff's office to keep an especially close eye on this defendant so that he does not take anything at all other than that which you afford to him.

Now, I don't know whether or not you want to keep him in this building or not, but that's the decision which you will make according to the best security measures that you are familiar with.

Two o'clock. The rest of the gentlemen will remain in this Courtroom. On the question of the hearing, I will make a judgment in about five minutes.

Please remain in the Courtroom. All right. And, counsel, I am going to call the jury down in about ten minutes and address them. Do we have an expression of opinion as to what we will tell this jury?

MR. VAN NORMAN: Just tell them that the hearing is going to take longer than we expected and, therefore, we put it over until two o'clock.

MR. BEKOFF: I concur completely, your Honor.

THE COURT: All right. Mark this.

(Above referred to Item marked as Court Exhibit.

A. Report.)

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THE COURT: All right. Recess.

(Recess.)

(After Recess.)

(Defendant not present.)

(Jury present.)

THE CLERK: People versus Thomas Francis Byrnes.

Trial continued.

THE COURT: Lady and gentlemen of the Jury, good morning. At the outset, let me say that this Court is not oblivious to the fact that you are a duly constituted jury and that you have been extremely patient. I indicated to you about four o'clock last night that this Court was going to conduct some further business in your absence. That hearing, which I have commenced, is not over. I anticipate that by 2:30 on this day, we should reconvene.

Now, lady and gentlemen, again I am not blind to the fact that you are here and that the human tendency would be to become impatient. As I look about and see the very fine jurors I am convinced that you will be able to overcome this impatience. And when you sit here as I have for over seven years,

you get that visceral feeling when you look at people day after day. And I am convinced that you are an outstanding group of people who can and will understand. That this is a Court of law and that we do move rather slowly and for good purpose.

There is a reason to most of it. There is good reason. At the outset when I spoke to you I repeated and repeated and repeated that you were the sole judges of the facts, that is, what happened, and that this Court would be the sole Judge of the law. When that time arrives when facts will be presented to you, and I am sure you will be as attentive as you are right at this moment, please, I implore you, do not speculate, don't guess, don't become impatient. I am going to ask you to do what you will until 2:30. Some of you are close enough to your homes and you have your cars and you can go home if you care to. But please be back at 2:30. If you care not to, you can just have a leisurely lunch and stretch your legs a little bit. Again, don't talk to each other, don't concern yourself with what is going on in this Courtroom in your

absence. And God willing, we will see each other at 2:30. All right.

(Jury leaves the Courtroom.)

THE COURT: Now, Doctor, you will be kind enough to return at two o'clock sharp?

DOCTOR LANIG: Yes, sir.

THE COURT: All right. Make it five minutes to two. Hopefully we will conclude the hearing in the presence of the defendant. All right. This Court stands recessed until two o'clock.

(Recess.)

(After Recess.)

AFTERNOON SESSION

(Jury not present.)

(Defendant present.)

THE CLERK: People versus Thomas Francis Byrnes.
Trial continued. People ready?

MR. BEKOFF: People ready.

THE CLERK: Defendant ready?

MR. VAN NORMAN: Defendant ready.

THE COURT: All right.

MR. DULBERG: Your Honor, you want us to

proceed now?

THE COURT: Yes. Just for the record, indicate your name and the agency you are representing.

MR. DULBERG: Yes, my name is Samuel Dulberg, and I am appearing for Charles Schinitzky of the Legal Aid Society, 105-34 Union Hall Street, Jamaica, New York. And I would like to call Doctor Lanig.

THE COURT: Let the record indicate that the purpose of this hearing is to aid and assist this Court in making a judgment relative to an application on the part of the Legal Aid Society of Queens County and in particular, the law guardian of the child, Tammy Byrnes, and her capacity to testify at the trial entitled, the People of the State of New York against Thomas Francis Byrnes. All right.

THE CLERK: All other witnesses are excluded from this Courtroom.

ROUNSAVILLE LANIG, 105-16 Union Hall Street, Queens Society for the Prevention of Cruelty

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to Children, Social Worker, called as a witness
in this hearing, and being first duly sworn,
testified as follows:

DIRECT EXAMINATION

BY MR. DULBERG:

Q Dr. Lanig, please state to the Court your
qualifications.

A I am a graduate from the University of Havana
Medical School, Class of 1960. Degree in medicine.
Specialty, GYNOB, gynecology and obstetrics.

Q Do you hold any other degree or have you taken
any further graduate study?

A Yes, from '67 to '69, the government sent
me to Moscow to the Neurological and Psychiatric Institute.

Q And what did you study there?

A The science of neurology and psychiatry.

Q For how long have you been with the Queens
Society for the Prevention of Cruelty to Children?

A Since April of 1971.

Q And what is the nature of your work with the
agency?

A I am employed as a protective worker.

Q And what is that, what does that involve?

A It involves protecting the children against abuse and neglect and helping them with petitions and working with families in this regard.

Q Have you had occasion in the past to investigate and deal with sexual abuse cases?

A Yes, I have.

Q Incest cases?

A Yes, sir.

Q Do you know Tammy Byrnes?

A Yes, sir, I do.

Q And how long have you known her?

A I knew Tammy Byrnes since the case was first presented to our agency in May of '71.

THE DEFENDANT: She's been through enough bullshit with you fucking clowns that I can't imagine. She's had it up to here, (indicating).

THE COURT: Mr. Byrnes, please--

THE DEFENDANT: With you clowns and you clowns and you clowns and you clowns--

THE COURT: Mr. Byrnes, please--

THE DEFENDANT: And especially this clown,

(indicating).

THE COURT: Mr. Byrnes, now you will either remain silent or I will have to take some appropriate steps. Do I have your assurance you will remain silent?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Byrnes, I will ask you now to remain silent. This is the second time.

THE DEFENDANT: May I say something, your Honor?

THE COURT: I think you ought to--whenever you would like to say something, please tell it to your lawyer--

MR. VAN NORMAN: Your Honor, I would appreciate it if the Court would disregard anything said by the defendant because of the problem that he may--at this time he is making statements which are against his interest. And I respectfully request that--

THE COURT: I am aware of that but I will say this -- Mr. Byrnes, listen to me carefully:

It was your desire to be present at this

hearing. It is my purpose to listen carefully as I can to make what I believe to be a proper judgment. You do not aid or assist your own cause by outbursts. You can't help either yourself or anyone else by insisting upon an outburst of this nature. I might indicate to you that this Court has the power to continue this hearing in your absence. I do not wish to exercise that power. I implore you to speak only through your attorney who has your best interests at heart.

Now, please have a seat.

THE DEFENDANT: Your Honor, may I say something please?

THE COURT: Please say it through your lawyer.

You can tell him and he will tell me. Continue.

DIRECT EXAMINATION

BY MR. DULBERG (Continuing):

Q Doctor, you state you know Tammy Byrnes since May of this year, is that correct?

A Yes.

Q And since May of this year, to date, how often have you seen the girl?

A I would say I have been seeing her at least twice a month since then including the time when she was removed to another state.

Q Was there a period of time when Tammy resided in your Shelter?

A Yes.

Q When was that?

A Immediately after she was introduced to us in May, and she stayed there for approximately, I think, fifteen days or something to that effect.

Q And was she under your supervision and care at that time?

A I was assigned, the assigned worker.

Q Doctor, have you had an opportunity to read the report of Dr. Blackwell which is part of the record in this case?

MR. BEKOFF: Your Honor, I will have to object to that.

THE COURT: Remain seated please.

A Yes, I have had occasion to read that.

Q Do you agree with the opinion reached in Dr. Blackwell's report?

Lanig - direct

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A The finding of the doctor I agree with--

Q When you say you agree with Dr. Blackwell's finding, what is it about his finding that you agree with?

A What impressed me the most was the finding and conclusion wherein the child will suffer. She hates to talk about these things. And she usually withdraws whenever you are trying to question her.

Q When you say, doctor, that you agree with Doctor Blackwell's conclusion that the child will suffer, when you used the word suffer, are you using this in the generic sense or in the medical sense or psychiatric sense, can you clarify what you mean by suffer?

A Well, actually in the capacity of the social worker, I would say that emotionally this will have, talking about the unpleasant experience as brought in the allegation, she wants to forget it, she would like to forget it.

Q Well, let me ask you this, doctor: Is this any--I would assume, and I am sure the Court would assume, that it is almost patently clear that the child would like to forget this. When you talk about suffering, are you talking about the fact that she might cry or are you talking

about something more severe or long term?

A Crying has nothing to do with it. But I am talking about the long range damage. That is my only concern.

Q Well, what would your prognosis be? That's what I am asking.

A Again, acting as a social worker, I would say that the less we confront this child with this, would be the best for her.

Q Let me ask you this, doctor, is it possible that Tammy could be questioned about this and speak openly and frankly and we wouldn't be aware that she was suffering? Would it necessarily be a visible suffering?

A It wouldn't necessarily be a visible suffering. She tried to keep things within herself, tried to do good, in other words. One experience with us, she was always cooperative because she felt that she was being punished by being with us at the Shelter so she would try to cooperate but she acts out later on, she will act out.

Q Doctor, in your opinion, is the child Tammy competent to make the determination as to whether or not she should testify?

A At that age right now I would say no.

Q Doctor, to your knowledge, has Tammy had to confront her father or see her father since you became familiar with the case?

A Not to my knowledge.

Q Can you predict the outcome of Tammy confronting her father with the incidents involved?

A I don't think I could predict that but it would be something to observe. The child might be damaged afterwards but I am not acting as a physician but I wouldn't like to see that.

Q Again, when you indicate damage, are you talking about--

A The long range effect after this kind of confrontation, something that she has been avoiding.

Q That's what I am going to ask you about now, the effects after this confrontation, would you label what it might result in?

A No, well, again, I don't think I can label it. The facts are that--I went as far as saying it will hurt her but she will feel that she should do it but she will also recoil by thinking that whatever she does she

will damage her father further, and she would--

Q Doctor, to your knowledge, is the child aware of the fact that what she says here today is against her father?

A I think she is old enough, yes.

Q Let me ask you this, if doctor Blackwell is right, Doctor, and you are right in concurring in his opinion--

A Also Dr. Zanger was mentioned--

Q Is Dr. Zanger the psychologist?

A Yes.

Q Well, if you were right, is it possible that the child's testimony here today could go into, can result in a problem that would stay in a state of remission and then come out again, you know, surface six months or a year from now, two years from now?

A I would be reluctant to answer it as such because not having done this complete psychiatric examination I wouldn't want to venture to say that. I know damage would be done, there is no question about that but further than that I can't say.

Q Could the damage be a psychosis?

A Again, I do not want to label any of it.
I know there will be damage though.

MR. DULBERG: I have no further questions.

THE COURT: Do you have any questions?

MR. BEKOFF: May I ask a few, your Honor?

THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. BEKOFF:

Q Doctor, very briefly, how many times did
you see Tar...

A Approximately twice a month.

Q Twice a month over a period of how long?

A I would say from about May until a few weeks
ago. Up until Saturday, Friday I would say.

Q And during these times you saw her, did you
actually sit down and talk to her?

A Most of the time I talked to her, just briefly,
and the most contact we have had was when we were at the
Shelter. I learned from our steady engagement at the Shelter
that this is something she wanted to forget, so you do not,
I do not follow up with her in this respect. She wanted
to forget and she was adjusting nicely, getting away from it

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so I did not pursue it. This is one of the reasons I thought it was a good idea when she went to--

Q You never discussed the fact of this case with her then, did you?

A No.

Q Did you make an attempt to discuss them with her?

A No.

MR. BEKOFF: All right. I have no further questions, your Honor.

THE COURT: Mr. Dulberg, do you wish to offer anything further?

MR. DULBERG: Yes, your Honor, but not from this witness.

THE COURT: All right. Doctor, you are excused.

(Witness is excused.)

MR. DULBERG: Your Honor, at this time I would like to offer, with all due respect to this Court, a copy, a certified copy of an advisory opinion issued by Honorable Saul Moskoff of the Family Court, Queens County. He issued this

yesterday in reference to the testimony of the child. And I think that this order speaks for itself.

THE COURT: Fine. Mark that as a Court Exhibit.

(Above referred to item marked as Court Exhibit B.)

THE COURT: Do you have anything further at all?

MR. DULBERG: I have no further evidence, your Honor.

THE COURT: All right. Gentlemen, there will be a five minute recess. Please don't leave the immediate confines of the Courtroom. The Court will return a determination in about five minutes.

(Recess.)

(After Recess.)

(Jury not present.)

(Defendant present.)

THE COURT: Gentlemen, there is a motion before this Court brought on by order to show cause

by the Legal Aid Society and I assume, by the Society for the Prevention of Cruelty to Children for an order restraining the District Attorney from calling as a witness the eleven year old daughter of the defendant at the trial of the People versus Thomas Francis Byrnes. As a husband, as a father, and as a Judge, I am not oblivious to the trauma and the problems which have been created and imposed upon the young lady involved herein. Everyone, everyone who has in any way, manner, shape or form, been touched by this case, is distressed, as is this Court, deeply distressed by the circumstances which confront us and which require judgment and decision.

However, this Court must assure that this defendant and the People receive a fair trial. The Court has listened to all the parties. I have read and re-read the affidavits submitted in support of the instant application, and the psychiatric report attached thereto, and the testimony of the physician who has just testified, and most important, in my determination and judgment

is the fact that I have conversed at length with the young lady, Tammy Byrnes.

Based upon the foregoing, this Court is of the opinion that the defendant's daughter will be able to testify at the trial of People against Thomas Francis Byrnes. Therefore, the application is denied in all respects. Bring the jury down.

MR. VAN NORMAN: Your Honor, may we again have a short recess.

THE COURT: Yes.

MR. VAN NORMAN: And may I have a room to discuss with my client certain aspects of this case at this time?

THE COURT: All right. We will make a room available for you.

MR. VAN NORMAN: Thank you, your Honor.

THE COURT: All right. Recess. Are you going to call Tammy Byrnes?

MR. BEKOFF: Yes, your Honor, she's in my office now.

THE COURT: All right. Bring her down. I want no delay.

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MR. BEKOFF: Yes, your Honor. May I have the Courtroom cleared first.

THE COURT: When she comes in we can do that. All right.

Mr. Van Norman, with your consent, I would suggest that at least one Sheriff be in the room with you.

MR. VAN NORMAN: No objection, your Honor.

THE COURT: All right.

(Recess.)

(After Recess.)

(Jury not present.)

THE CLERK: People versus Thomas Francis Byrnes.

THE COURT: Gentlemen, this trial will continue. Bring the jury down.

MR. VAN NORMAN: Before the jury gets here, your Honor, and in the presence of the defendant, the defendant at this time, your Honor, wishes to make a motion to strike the testimony of Mrs. Byrnes based again upon the fact of privileged communication. It is pointed out by the defendant that we have learned there is a communication that was directed

from the defendant, Thomas Byrnes to the wife, some time after the indictment, your Honor, concerning the matters contained in the indictment. This letter, we understand, is in the possession of the District Attorney's office. And we feel that the District Attorney, having been aware of the communication, a written communication concerning this case, had no right to present that particular individual on the stand to testify to matters and conditions concerned in this trial. And that the privileged communication that exists between two married people is a sufficient and valid privilege that has been violated by this Court and by the District Attorney. And we respectfully request that District Attorney produce the letter for your Honor's edification so you can read it and make a sufficient determination of whether or not that privilege has been violated.

THE COURT: Well, the Court has never seen this letter. I know it's been alluded to. The letter in my opinion, may be within the purview of the privilege; unless and until it is offered to me

by the People, it will not and can't be considered by me.

MR. VAN NORMAN: Your Honor, I ask the People then to produce the letter since I have never seen the letter so I may offer it into evidence for the purposes of the motion that I made before the Court.

THE COURT: Fine. Do you have such a letter?

MR. BEKOFF: Well, your Honor, the People have no letter which we plan to present during our direct case.

THE COURT: No. His application is addressed as follows:

He takes the position that you were in possession of a privileged communication. I am not saying you are or you are not. And as such, you should not have called Mrs. Byrnes to the witness stand for any purpose. I am not agreeing with him or disagreeing with him. I am directing you to produce it if you have such a letter.

MR. BEKOFF: I have letters, your Honor, which are addressed to the mother-in-law of the defendant.

THE COURT: Not to the mother--not to the wife--

MR. BEKOFF: Well, I have also a letter addressed to the wife in care of the mother-in-law if I make myself clear. Sent to the mother-in-law's address.

THE COURT: But addressed to the wife.

MR. BEKOFF: Which the wife has never seen, your Honor. Do I make myself clear, your Honor? The letter was sent to Mrs. Marie Byrnes in care of Mrs. Virginia Alfertra (phonetics), the address of Mrs. Alfertra, who is the mother-in-law. The letters were received by Mrs. Alfertra and never turned over to the wife.

MR. VAN NORMAN: Your Honor, that takes me by even further surprise than interference with mail that's been sent by the defendant. As far as I am concerned, it is a letter sent to the wife that establishes the privilege, if in fact that letter discusses the crimes contained in this indictment so I respectfully request that it be given to me so I may present it to the Court and I have no intention to even reading it, your Honor,

prior to presenting it to the Court, or letters,
your Honor.

THE COURT: Let me see it.

MR. BEKOFF: Well, I don't know if I have
them here, Judge. I will take a look.

MR. VAN NORMAN: Well, your Honor, as I said,
this came to my attention yesterday afternoon and
as a result of seeing the letter presently within
the possession of the District Attorney.

MR. BEKOFF: I would ask how, your Honor.
I never displayed the letters in Court.

MR. VAN NORMAN: Your Honor, he has Tammy's
testimony, rational and irrational acts and so on
and he had on this list, "letters from Mr. Byrnes
to Mrs. Byrnes."

MR. BEKOFF: Your Honor, everything here
is cases and textbook law which I have covered,
(indicating). Not one of these things contains one
shred of evidence in this case.

MR. VAN NORMAN: Your Honor, I respectfully
request that he produce the letter.

THE COURT: Do you have such a letter?

MR. BEKOFF: I was starting to look, your Honor.

MR. VAN NORMAN: Your Honor, I don't want the technicality that he doesn't have it on the table and he has it upstairs. Has he at any time seen a letter or is in possession of a letter addressed by the defendant, Thomas Byrnes to the wife in care of the mother-in-law or anyone else? Would you answer that please, Mr. District Attorney?

THE COURT: Mr. Van Norman--

MR. VAN NORMAN: Excuse me. I apologize, your Honor. Would you please direct him--

THE COURT: I have. Calm down.

MR. BEKOFF: I have two letters here, your Honor, (indicating), and they are both addressed to Mrs. Virginia Alfertra,

THE COURT: All right. Hand them to me. Let them be marked Court Exhibits.

(Above referred to items marked as Court Exhibits C and D.)

MR. BEKOFF: I would point out, your Honor, if it please the Court, that these letters have

absolutely nothing to do with the privileged communication which counsel alleges extends to the testimony of the wife.

THE COURT: May I read them please?

MR. BEKOFF: Certainly.

(Pause during proceedings.)

MR. BEKOFF: May I say something which may clarify that?

THE COURT: You can say nothing until I have completed reading the letters.

MR. BEKOFF: All right, your Honor.

(Pause during proceedings.)

THE COURT: Gentlemen, let the record indicate that I have read both letters. One has a post date of June 18th, 1971, where in effect he said exactly what he said this morning when he addressed the Court. There is no need for me to repeat that. But the letter is in conformity with exactly what he said this morning. The other letter is dated, the post date indicates September 27th, the opening remark reads as follows:

"How are you. And the kids. I hope everything is okay. I would like to apologize for the last

letter I sent to you. It was full of hostility and anger."

Then it goes on. Gentlemen, let the Court make itself clear with regard to the matter of the privilege. Privilege does not extend in my opinion to the everyday almost mundane happenings between husband and wife. And it was for that reason that I permitted the defendant's wife to identify a photograph of either her husband or her daughter. Whether the Court's Exhibits C and D are confidential in nature is of little importance to me at this time because they are not before this Court as such nor are they at this time being offered in evidence. The jury is not present. Certainly no one in this Courtroom will deliberately reveal the contents of these letters. I am satisfied that this Court has not violated a privilege which exists between a husband and a wife.

Your application is denied. Your exception is noted. We will continue. Put these letters in our file.

MR. BEKOFF: May the record reflect I am going

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MR. BEKOFF: May the record reflect I am going to have to, your Honor, tag the letters. They were both addressed to Mrs. Virginia Alferra, and that is the mother-in-law of the defendant, whose nickname is Dolly, and she received them in the mail, they were duly addressed to her and she turned them over to her custody, and as part of the People's case, they might be evidence.

THE COURT: Well, if you intend to offer it I will hear you in the absence of the jury and we will make a judgment in that regard. But as of this moment, I think that the record should reflect that this Court has them in the permanent file of this trial and that if this matter is reviewed and the argument is made in the Appellate Division or wherever else it is argued, that the letters should be preserved and I am doing that, they are certainly available to you if you at any time during this trial intend to use them. When and if you make that motion in the absence of the jury, this Court will make a judgment as to whether or not they are in fact, privileged communications and will or will

not be offered into evidence. You have your exception.

MR. BEKOFF: Thank you, your Honor.

THE COURT: Gentlemen, there are numerous people in this Courtroom. It is my understanding that the child, Tammy Byrnes, will be called to this witness stand. This Court has discretion and I must exercise that discretion now with the consent of the defendant and the People, that we will conduct the offer of proof or the testimony of Tammy Byrnes without spectators. I would ask that everyone please leave this room.

MR. BEKOFF: Your Honor, may I have permission for Mrs. Byrnes to stay in the Courtroom, Tammy's mother?

THE COURT: No.

MR. VAN NORMAN: Your Honor, on behalf of the defendant, as previously indicated to you, we respectfully request that counsel be appointed to represent the child for this proceeding prior to her giving any testimony before this Court due to the fact we feel that the testimony which she will give

is of such a nature that it could incriminate her either in this proceeding or some other proceeding so we respectfully request that such a guardian of her person be appointed by this Court and give him sufficient opportunity to discuss the case with her prior to her testimony.

THE COURT: Gentlemen, I thought about that. And it is my decision that she, in this matter, is as a matter of law, under the age of consent. Therefore, she can't and will not be charged either as an accomplice or as a principle in any manner, shape or form which would include a charge of juvenile delinquency.

Your application is denied.

MR. VAN NORMAN: Exception, your Honor.

MR. BEKOFF: Your Honor, may the other gentlemen please leave the Courtroom, (indicating).

THE CLERK: You will have to leave, Mr. Dulberg and Dr. Lanig.

MR. DULBERG: Your Honor, with Dr. Lanig I would ask the Court that at least he remain. He is going to have to continue to work with the girl.

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I don't know how long.

THE COURT: Well, do you think his presence will further disturb this young girl?

MR. DULBERG: No, your Honor, I don't think it will.

MR. BEKOFF: May I be heard, your Honor?

THE COURT: Yes.

MR. BEKOFF: I have spoken to the girl and she told me, she is sitting right in the back now, that she would appreciate it that he not be here because she is afraid of him.

THE COURT: Will you please leave, doctor.

DOCTOR LANIG: Yes, your Honor.

THE COURT: Do you wish to remain, Mr. Dulberg?

MR. DULBERG: Yes, your Honor, and Mr. Shuter, my associate?

THE COURT: All right.

MR. BEKOFF: Your Honor, I would ask that they be placed in the back of the Courtroom please.

THE COURT: All right. Sit in the back, gentlemen.

MR. BEKOFF: Your Honor, the girl's mother is

asking very strongly to come in and I would ask permission of the Court to have the mother here.

THE COURT: I think it is a mistake. I have had these matters before. They are very reluctant to--there are going to be difficulties--if you want the mother in you can have her in counsel, there is an application to have the mother there in the Courtroom.

MR. VAN NORMAN: Your Honor, that I would have to object to.

THE COURT: I think that is a proper objection. Objection sustained. My experience indicates that it does not aid, it does not satisfy the requirements of this Court.

MR. BEKOFF: All right, your Honor.

THE COURT: Bring the jury down.

Mr. Byrnes, please sit down.

THE DEFENDANT: Your Honor, I have to leave.

THE COURT: No, Mr. Byrnes, please be seated.

THE DEFENDANT: Your Honor, I took twelve thousand miligrams of drugs.

THE COURT: Mr. Byrnes, please be seated.

THE DEFENDANT: Fuck.

THE COURT: Easy, easy.

THE DEFENDANT: You big fucking bum.

THE COURT: Easy, easy.

(Defendant subdued by Sheriffs while the
Judge leaves the Courtroom.)

(Recess.)

(After recess.)

THE COURT: All right. Let him up. Mr.

Byrnes, listen to me carefully.

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Byrnes, now, I know this is
a difficult moment for you. I have tried to preside
here fairly. I think you know that. But this trial
must continue. Now, if it must continue in your
absence, I can do that. I do not wish to have this
jury see you act in this fashion because it will do
you no good. You have neither won nor lost this case.
You are not giving your lawyer an opportunity, do
you understand me?

THE DEFENDANT: Yes, your Honor.

THE COURT: You are not giving your lawyer

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the right to do what he can for you. Do I have your assurance you are going to be all right?

THE DEFENDANT: Yes, your Honor.

THE COURT: I have your promise?

THE DEFENDANT: I was, you know--

THE COURT: I know you are upset and I don't blame you.

THE DEFENDANT: It was just like, you know, when I was a kid I went through the same junk.

THE COURT: All right. Now, listen, Mr. Byrnes, if I ask them to take those cuffs off, will you promise to sit there quietly?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Take the cuffs off.

MR. VAN NORMAN: Your Honor, may we have first aid for him prior to the jury coming in so his head can be cleaned up?

THE COURT: All right. Take him in the back. Mr. Byrnes, I have your promise?

THE DEFENDANT: Yes.

THE COURT: Now, please, it means a lot to me. Now, can you take him somewhere and wash him up and

comb his hair?

THE SHERIFF: Right.

THE COURT: All right. Now, Mr. Byrnes, look at me right in the eye and listen to me carefully now.

THE DEFENDANT: Yes, your Honor.

THE COURT: You are not giving your lawyer the opportunity to represent you. This is not going to help you. I know you are upset. I know-- at least I think I know what is going on in your mind. I can appreciate it. You see now that I am not angry with you, nor am I threatening in any manner, shape or form. I am just trying to reason with you. Give your lawyer the opportunity that every defendant should have.

THE DEFENDANT: Your Honor, screw my lawyer, screw everybody, please. Give me the electric chair, please. The chair. That's all I have asked for ever since I got arrested.

THE COURT: Mr. Byrnes, please, go in and wash up now. You have given me your word. If you violate that then from here on in, you are going to

be treated like you have to be treated. All right.
He is going to be all right. Take him in back.

THE SHERIFF: Yes, your Honor.

(Defendant leaves the Courtroom.)

THE COURT: We have got to do it. It is as
simple as that. Whether you do it tonight or tomorrow
or the day after, you are going to get this and we
just have to proceed. All right.

(Recess.)

(After recess.)

(Defendant present.)

(Jury not present.)

THE CLERK: People versus Thomas Francis Byrnes.

THE COURT: All right. Mr. Van Norman,
just for the record, I think the blood on the
defendant's face was from the finger which is
bleeding of the Sheriff's hand and not from the
defendant. Bring the jury in please.

(Jury present.)

THE CLERK: People versus Thomas Francis Byrnes.

Trial continued.

People ready?

MR. BEKOFF: People ready.

THE CLERK: Defendant ready?

MR. VAN NORMAN: Defendant is ready.

THE CLERK: Jury all present, your Honor.

THE COURT: Call your next witness.

MR. BEKOFF: If it please the Court, the
People call Tamara Byrnes.

THE DEFENDANT: Tammy, Tammy.

(Defendant subdued by Sheriffs.)

THE COURT: All right. Take her out.

Gentlemen, please leave the Courtroom at this time.

(Jury leaves the Courtroom.)

(The following occurred in the hallway

with the Jury.)

THE COURT: Madam and gentlemen of the jury,
I know it is difficult to dispell in your mind
what you have just seen. I know also that you are
adult enough to understand the problem that is now
before us. It was for that reason that we have been
delaying this matter and exhausting your patience,
actually. But, please bear with us. It is a
delicate, delicate situation which I am sure each

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of you understands. I would ask you to dispell from your mind what you have just observed. It is no part of this trial. We will call you in a few minutes.

(Recess.)

(After recess.)

(Defendant present.)

(Jury not present.)

THE COURT: Gentlemen, let the record be clear that when the witness Tammy Byrnes entered the Courtroom and was seated, that the defendant for the third or fourth time gave forth with an outburst which was, in my opinion, more than an outburst because together with the outburst was a jumping on the counsel table and almost an assaultive burst towards the witness in such an extent that it took four or five gentlemen from the Sheriffs' office to subdue the defendant at which point the witness was immediately excused, the jurors were immediately excused. And so, to talk to the jurors immediately, before they could even dwell upon or think about the outburst, I went into the hallway and spoke to them.

I will now ask the Court Reporter to read exactly what I stated to the jurors in the hallway. And I might say, I did so to instruct them immediately rather than let any time go by. And I am now going to ask the Court Reporter to read exactly what was said by me in the hallway.

(Whereupon, the above referred to information was read back by the Reporter.)

THE COURT: Let the record also indicate that I have on three or four other occasions, after outbursts on the part of this defendant, attempted to reason with Mr. Byrnes. The record will bear witness to the fact that I have indicated to him that outbursts of that nature can't in any manner, shape or form aid and assist him as the defendant and puts his attorney at a great disadvantage. In my opinion, he is well and ably represented by Mr. Van Norman.

THE DEFENDANT: Your Honor, may I say something?

THE COURT: I will hear you in a moment, Mr. Byrnes. From my observations, the Court finds that as a matter of fact, that this defendant, who

was comparatively calm throughout the proceedings, when confronted with the witness, his daughter, Tammy Byrnes, by his actions and his words, attempted to intimidate her, feeling that her testimony might be so detrimental to him that he would be in grave trouble and difficulty as this trial progressed.

I had received a promise from Mr. Byrnes moments before the incident that he would behave himself. With that in mind, I directed the Sheriffs to remove the handcuffs which were previously placed on his hands because this Court honestly and genuinely feels that the ends of justice are best served when a defendant is not shackled. I do not mouth the expression meaninglessly that a man is presumed innocent until proven guilty by the People beyond a reasonable doubt. I live by that rule. I preside in this Courtroom by that rule. And anything and everything that is done by a defendant that is disruptive in nature, which stands between a fair trial and a trial which gives the impression or atmosphere which is unbecoming to all of us, I am against. I have options here. I can bind and

shackle this defendant. I can make it impossible for him to speak. This troubles me. I do not wish to conduct a trial under these circumstances. But I think the outbursts are deliberate, they are intended to intimidate this young, very young witness. And if I were to in any manner, shape or form, condone the behavior of this defendant, I would be doing exactly what he wants me to do.

In such a case, I neither afford a fair trial to the People nor to the defendant. I will try to give a fair trial to both the defendant and the People.

It is extremely distasteful for me to continue in this trial while the defendant is bound and gagged. I am, therefore, going to recess for the balance of this day and indicate to you clearly that it is my thought that the defendant will not be in the Courtroom when the witness Tammy Byrnes testifies. This not by my order, not by my pleasure, but by the acts and the deeds of this defendant who has taken what I believe to be an orderly trial and disrupted it deliberately and intentionally.

Does counsel for the defendant wish to be heard?

MR. VAN NORMAN: Certainly, your Honor. Your Honor, it is elementary to justice that defense counsel be permitted to converse with his client during a trial.

THE COURT: Unless he makes it impossible.

MR. VAN NORMAN: As you have stated, your Honor, we are at a point, a most critical point in this trial, and if I am unable to converse in any manner, either by writing or by finger language or sign language, I will be at a complete and total disadvantage and will not be able to properly conduct this trial in the defense of the defendant. So I respectfully request, your Honor, that you not remove him from this Courtroom. Some other means if you think means are necessary, may be found in order for me to properly converse with this defendant during the period of this crucial portion of this trial. I have two motions I would like to make at this time, your Honor.

One, I would like to order a 658, I request

that the Court order a 658 of the defendant.

THE COURT: 730.

MR. VAN NORMAN: The numbers change, your Honor.

THE COURT: All right. Continue.

MR. VAN NORMAN: Psychiatric evaluation of the defendant as to whether or not he is capable at this time to continue to stand trial.

Your Honor, you have stated for the record that it is your opinion that he did this for ulterior purposes. I don't know, your Honor. I am not qualified in this area. I have had a very trying day attempting to converse with the defendant, both in the Courtroom and outside of the Courtroom. And I can tell your Honor, quite frankly, that it has been totally impossible. In fact, on one occasion when I was conversing with him in an effort to arrive at a resolution of this matter to avoid the child from testifying, the defendant stood up and dropped his pants and took his penis out and exposed it to me in proof that he was not the one involved in this particular crime. These are not acts of a

rational individual, your Honor. These are acts of a person that is suffering under a serious psychosis or serious mental condition. And I respectfully request that the Court order--since we are going in recess--such an examination for this evening. I will make myself available if necessary to be there and present during the examination. That's the first of the motions.

The second, your Honor, is a motion for a mistrial. The motion for a mistrial is based upon the fact that when Tammy Byrnes, in the complete and total sight of the jury, entered into this Courtroom, Tammy was accompanied by a Court Officer or an Officer appointed by the District Attorney's office. I think the protective shed over the child by the accompaniment of this Officer who came into this Court hand in hand with the young child, is a serious containment of my defendant in showing that she needs protective custody in order to testify at this trial; and it is detrimental to the rights of the defendant.

And I respectfully request that, due to this act which I had no control over and I did not know

it was about to happen and which would seriously prejudice the rights of my client.

THE COURT: Well, to answer the second motion first, the young lady accompanying the young girl, Tammy Byrnes, apparently was for the sole purpose of putting the young child at ease. I think the record should be clear that yesterday in chambers when in your presence I conducted a very, very informal hearing, that the little girl sort of clung to this woman.

THE DEFENDANT: Bullshit. She's the one that's trying to take the kids away from my wife too. She's the one that's got the charges in Queens. Hahn. She's trying to take the kids away from my wife.

THE COURT: Mr. Byrnes, I have said it before and I am going to say it again--

THE DEFENDANT: Well, why don't you have these guys shoot me then?

THE COURT: Mr. Byrnes, I am not impressed.

THE DEFENDANT: I am not even going to listen anymore. You said it was prefabricated that my daughter come in, right?

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THE COURT: All right. Let him go.

THE DEFENDANT: Get your fucking hands off me.

THE COURT: Mr. Byrnes, if you will be patient with me, I will be patient with you. In any event, your applications are denied.

With regard to the further psychiatric examination, everything that I have observed, everything that this defendant has uttered, appears to be a deliberate, almost premeditated move on his part to disrupt these proceedings. Your application is denied. If you care to submit to me authority which would help me make a judgment with regard to whether or not we will proceed tomorrow with this defendant shackled and bound or in his absence, I would be happy to read and be guided by that authority.

MR. VAN NORMAN: Well, we will do that, your Honor.

THE COURT: I might add that it is my opinion that not only will he disrupt the trial, but he will, in fact, as he has in fact intimidated the witness. Gentlemen, this Court stands recessed

until tomorrow morning. We will have a short recess first though and then bring in the jury.

(Recess.)

(After Recess.)

(Defendant present.)

(Jury present.)

THE COURT: Madam and gentlemen of the jury, this Court is about to stand recessed until tomorrow morning. Please report at nine-thirty. I am going to repeat to you the admonition that I spoke to you about in the hallway just a few moments ago. This trial will be decided on the evidence and the evidence alone and the charge of this Court. And that judgment on your part will come only after all of the evidence is in and all of the law has been recited to you. I ask you and direct you to dispell from your minds, to wipe from it, the outburst which you obviously witnessed a few moments ago. It is no part of this case. It is not evidence. I am sure it will not be considered by you when that time arrives. To dwell upon it now would be error and wrong. It would be in violation of your sworn

obligation to decide this case at the appropriate time. And that appropriate time is when you are in that jury room at its total completion. Please do not talk to each other, again, about this matter. Certainly you can't and I am sure you will not make mention of what took place in this Courtroom at the dinner table tonight or at the breakfast table tomorrow morning. It would be wrong. I am sure you can handle it. I am sure you have that capacity.

Please don't violate that confidence or that trust which has been imposed in this jury. Madam and gentlemen of the jury, we will see each other, God willing, tomorrow morning. Make it ten o'clock.

Good night.

(Jury leaves the Courtroom.)

MR. VAN NORMAN: Your Honor, I wish it noted for the record that as the jurors came in, each one of them observed the present condition of the defendant in the Courtroom at this time.

THE COURT: Yes, let the record indicate that he is handcuffed and the handcuffs are behind his back.

MR. VAN NORMAN: Thank you very much, your Honor.

THE COURT: And this, in my opinion, a most reasonable restraint in view of what I had observed in the last half or three quarters of an hour.

THE DEFENDANT: That was just to say hello to my daughter, that's all, your Honor.

THE COURT: I would ask, gentlemen, that you offer to me as early as possible tomorrow morning your views with regard to the conduct of this trial for the balance of this trial or at least insofar as the witness, Tammy Byrnes, is concerned.

MR. VAN NORMAN: Certainly, your Honor.

MR. BEKOFF: Yes, your Honor.

THE COURT: I might add, that this Court, in a very few moments, will be chatting with the young girl, Tammy Byrnes, in an attempt to calm her down. This must have been an awful experience for her. I invite you, counsel, to be present, if you desire to do so.

MR. VAN NORMAN: I would like to be present, your Honor.

THE COURT: I would ask that you do not--

MR. VAN NORMAN: Make comment.

THE COURT: Do not make comment. And leave the entire matter to the discretion of this Court.

MR. BEKOFF: Fair enough, your Honor.

THE COURT: May I ask for one thing, your Honor, and I request that the Police woman not be present during this period of time. Certain information has come to my knowledge, your Honor, and I respectfully request, unlike yesterday, that the Policewoman not be present while there is discussion between you and Tammy Byrnes.

MR. BEKOFF: Your Honor, I would certainly oppose that. I feel that especially since what has happened, that this afternoon--

THE COURT: Well, I know there is a certain attachment between this young lady and the Police Officer, the woman. I will try to handle it without her. If I find that I am having great difficulty, then I will have to make a judgment at that time. But I certainly will try to honor your request.

MR. VAN NORMAN: Thank you very much, your

Honor.

THE COURT: All right.

(The following occurred in Chambers.)

(Present: Assistant District Attorney,
Ronald Bekoff, Mr. James Van Norman, Mr. Samuel
Dulberg.)

THE COURT: Come in, sweetheart and have a
seat.

(Tammy Byrnes enters the Chambers.)

THE COURT: All right. You must be upset
a little bit.

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: I am sure you are. It is nothing
to be ashamed of, being upset. I am upset. You
see? Everyone who was in the Courtroom was just
a little bit upset. And we all know that you must
be upset too. That's very, very, you know, natural,
you know that, don't you?

WITNESS TAMARA BYRNES: (nods head yes.)

THE COURT: I told you yesterday when we sat
here I would let no one in any way, harm you. Do
you recall that?

WITNESS TAMARA BYRNES: Yes.

THE COURT: As soon as something happened I did ask you to leave the Courtroom. You saw that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: I saw that whatever you were feeling you wouldn't feel for too long a period of time. Do you understand that?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: I know this must be very difficult for you. Do you recall yesterday when I said to you that when you offer testimony you don't offer it for somebody or against somebody?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You offer testimony to the truth. Do you recall that?

WITNESS TAMARA BYRNES: Yes.

THE COURT: That a girl. Now, what the result of that truthful testimony will be is really something that you have no control over. It is like the weather. You would like it to be sunshiney all the time, sweetheart, but sometimes it rains, is that right?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You are a very fine young lady. And I have a great affection towards you because I know that you have strength far greater than a little girl eleven years of age. Trust me, sweetheart.

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Again, remember, keep in mind that if and when you take the oath you will be calling upon God to witness what you say. You answer what you can and what you can't answer, you can't answer. Now, you know that, sweetheart?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: What I am going to ask you to do is a difficult thing. I am going to ask you to smile a little bit tonight. That a girl. You see how pretty you look when you smile. Smile a little bit tonight and say a prayer for yourself, say a prayer that I am a better Judge. Will you do that for me, make me a better Judge?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: And say a prayer for all of us. We are trying to do the right thing. So you have a

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good night's rest. All right?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: And you will feel better if you smile a little bit because, you know, it is the best thing for you. It makes you feel better. All right?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: That was a terrible experience that you went through, I know that. You see, feel my hands. You see? They are just as cold and clammy as yours. And I am, you know, I am a big boy. So that, don't be frightened just because you were upset. You had a right to be upset. All right?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Do I have a promise you are going to try to smile tonight?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Think of nice things. Just put all nice things in your head and think of them. And just like when you know it is raining, the sun will come out, the sun will come out here. You know, the sun has to come out, you know that?

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WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Sometimes it rains a little bit heavier than other times but sooner or later, sweetheart, the sun does come out. All right?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You are going to have a restful night? Try. I don't know whether you can or not, but you are going to try?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: You are going to try to smile?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: And the most important thing is that you pray for yourself and to make me a better Judge, all right?

WITNESS TAMARA BYRNES: (Nods head yes.)

THE COURT: Good-night, sweetheart. I will walk you to the door.

(Witness Tammy Byrnes, leaves Chambers.)

THE COURT: Gentlemen, tomorrow morning at ten o'clock.

(Whereupon, the above trial was adjourned.)

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